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CHARLES ELMORE

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1932.

No. 518

Pacific Coast Steel Company, a corporation,
Petitioner,

vs.

John P. McLaughlin, United States Collector for the First Collection District of California,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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IN THE

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OCTOBER TERM, 1932.

No.....

Pacific Coast Steel Company, a corporation,

Petitioner,

vs.

John P. McLaughlin, United States Collector for the First Collection District of California,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION.

To the Honorable, the Supreme Court of the United States:

The petitioner, the Pacific Coast Steel Company, a corporation, by its attorneys, prays that a writ of *certiorari* issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, entered in the above entitled cause on August 22nd, 1932, and reported in 61 Fed. (2d) 73, affirming the decision of the District Court.

STATEMENT.

The petitioner, Pacific Coast Steel Company, brought this action in the District Court for the Northern District of California, Southern Division, for the recovery of income and excess profits taxes for the calendar year 1917, claiming that said taxes were illegally collected as deficiency taxes. The major question, the determination of which involves several issues, is whether or not the collections of this 1917 deficiency tax in the amounts of $111,953.71 on June 30, 1927, and $103,111.16 plus interest of $26,808.90 on August 27, 1928, were erroneous and illegal because of having been made after the applicable periods of limitation had barred the right of the Collector to make collection of said tax deficiency. The case was submitted to the District Court upon a stipulation of facts [R. 28]. The Honorable District Court rendered judgment in favor of the defendant [R. 46]. The Honorable United States Circuit Court of Appeals affirmed the decision of the District Court [R. 86]. A summary statement of this case follows:

On March 30, 1918, the petitioner duly filed its 1917 income and profits tax return, and duly paid the tax shown thereon. [R. 4, 28, 65.]

On December 16, 1922, the petitioner filed a waiver (set out in full in Appendix A hereto), consenting to a "determination, assessment, and collection" of its 1917 taxes "irrespective of any period of limitations." [R. 6, 11, 28, 66.] This waiver expired April 1, 1924. [R. 69.]

On February 9, 1923, an additional tax for 1917 was duly assessed against the petitioner in the amount of $257,443.30. [R. 6, 28, 66.]

On April 1, 1924 (the date of expiration of the December 6, 1922, waiver filed by petitioner), the period for collection of the aforesaid deficiency in taxes expired by virtue of the provisions of Section 250(d) of the Revenue Act of 1921. [R. 69, 70.]

On June 2, 1924, the Revenue Act of 1924 was enacted.

On December 7, 1925, the petitioner filed a waiver (set out in full in Appendix B hereto), of "the time prescribed by law for making any assessment" of 1917 taxes [R. 6, 13, 28, 66] and the waiver further provided that "this waiver for making any assessment as aforesaid shall remain in effect until December 31, 1926, and shall then expire," unless an appeal is filed to the Board of Tax Appeals. This waiver was not signed by the Commissioner of Internal Revenue nor by any one for him. [R. 13.] The petitioner contended that this waiver was "invalid and ineffective" for the following reasons:

(1) It was not signed by the Commissioner of Internal Revenue or by any one for him and was not, therefore, an agreement or consent in writing provided for by Section 278(c) of the Revenue Act of 1924. (Sections 277 and 278 of the Revenue Act of 1924 are set out in Appendix D hereto.)

(2) It was an *assessment* waiver which was the only kind of waiver authorized by Section 278(c) of the Revenue Act of 1924, there being no need of collection waivers because of Section 278(d) which allowed six years after assessment for collection. This waiver could, therefore, not be construed as a waiver authorizing the *collection* of a barred tax.

(3) Section 278(e) restricts the other subdivisions of Section 278. Therefore, Section

278(e) would prevent any waiver filed under Section 278(c) from being effective in its application to any assessment or collection of tax which was barred at the time of the enactment of the Revenue Act of 1924.

As to petitioner's first contention the Honorable Circuit Court of Appeals apparently ruled that the Commissioner's signature was not necessary since it decided that said waiver was valid. As to petitioner's second contention, the Honorable Circuit Court of Appeals apparently ruled that a waiver of the time for assessment was valid as a waiver of the time for collection of a tax upon authority of the case of *Stange v. United States*, 282 U. S. 270.

As to petitioner's third contention the Honorable Circuit Court held that Section 278(e) does not restrict or qualify Section 278(d). Regarding this waiver and the effect thereof, the Honorable Circuit Court of Appeals concluded [R. 78]:

> "We are of the opinion that the waiver voluntarily executed by the appellant taxpayer on December 7, 1925, was effective and that it operated to revive the right of the Government to collect the taxes that had been lawfully assessed on February 9, 1923, although at the time this waiver was given and prior to the date the Revenue Act of 1924 became effective, the statute of limitations had run against the remedy of collection. We think this conclusion is in consonance with the decision of the Supreme Court. See Burnet v. Railway Equipment Co., 282 U. S. 298; Stange v. U. S., 282 U. S. 274; Brown and Sons v. Burnet, 282 U. S. 283; Aiken v. U. S., 282 U. S. 277."

On February 26, 1926, the Revenue Act of 1926 was enacted.

On November 29, 1926, the petitioner filed a waiver (set out in full in Appendix C hereto) of the "time prescribed by law for making any assessment" of 1917 taxes. [R. 6, 29, 67.] The waiver further provided that "this waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1927, and shall then expire."

On June 30, 1927, a part payment of $111,953.71 was made against said 1917 deficiency [R. 7, 28, 67] (which deficiency had theretofore by valid credits been reduced to $215,064.84), by the application by the Commissioner as a credit against said deficiency, of an amount of $111,953.71 representing overpayments by this petitioner of its income and profits taxes for the years 1918 and 1919.

Petitioner contends that on February 26, 1926, its liability for the payment of the 1917 tax deficiency was extinguished by Section 1106 of the Revenue Act of 1926 (Appendix D hereto) and that, therefore, this collection on June 30, 1927, of $111,953.71 was illegal. The Honorable Circuit Court of Appeals held that since the assessment waiver of December 7, 1925, was effective as extending the time for collection of the 1917 tax to December 31, 1926, and since, therefore, the collection was not barred on February 26, 1926, and since the assessment waiver of November 29, 1926, was given before the expiration of the December 7, 1925, waiver and was likewise valid as a collection waiver, the collection was within the period as extended by the waivers and, therefore, valid. [R. 79.]

December 31, 1927, was the expiration date of the waiver period specified in the November 29, 1926, waiver.

On August 27, 1928, the balance of the 1917 deficiency of $103,111.16 plus interest of $26,808.90 was collected by the respondent. [R. 8, 28, 67.]

Petitioner contends that this collection was invalid as being made after the liability for said tax had been extinguished by Section 1106 of the Revenue Act of 1926, and *further*, that even if all the assessment waivers were valid and effective as extending the time for collection of the 1917 tax deficiency, this collection on August 27, 1928, was invalid because made after the date of expiration of the November 26, 1926, waiver. The Honorable Circuit Court of Appeals ruled that the provisions of Section 278 (d) of the Revenue Act were to be so construed to allow six years from assessment for collection, and that those provisions "became an inextricable part of the waiver" and "its terms and provisions must be read into and with the waiver" of November 29, 1926, and that, therefore, the period for collection of the 1917 deficiency did not expire until February 9, 1929, six years after the date of assessment. [R. 80.]

Specifications of Errors.

The Circuit Court of Appeals erred:

1. In holding that the waiver of December 7, 1925, though a waiver of *assessment* only, was valid and effective as a waiver of the period for *collection*.

2. In holding that the waiver of December 7, 1925, was valid though not signed by the Commissioner, and that Section 278(c) does not require the written signature of the Commissioner, either by himself or by some one else for him.

3. In holding that Section 278(e) of the Revenue Act of 1924 did not qualify Section 278(c) of said Act in respect to waivers on collection of taxes barred prior to June 2, 1924, and in holding therefore that the waiver of December 7, 1925, "was effective and that it operated to revive the right of the government to collect the taxes that had been lawfully assessed on February 9, 1923, although at the time this waiver was given and prior to the date the Revenue Act of 1924 became effective, the statute of limitations had run against the remedy of collection." [R. 78.]

4. In failing to hold that the December 7, 1925, waiver was invalid and that the liability for the barred tax was extinguished by Section 1106 of the Revenue Act of 1926.

5. In holding that the waiver of November 29, 1926, though a waiver of *assessment* only, was valid and effective as a waiver of the period for *collection*.

6. In failing to hold that the waiver of November 29, 1926, could not revive an extinguished *liability* for taxes.

7. In holding that the waiver of November 29, 1926, which was signed by the Commissioner and by its terms provided "This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1927, and shall then expire," was valid and effective to extend the period for collection of said 1917 tax deficiency, to February 9, 1929, six years after the date of assessment of said tax.

8. In holding that the amounts paid on June 30, 1927, and August 27, 1928, or either of them, did not constitute overpayments and were not refundable to petitioner.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. (a) This decision of the Honorable Circuit Court of Appeals in this proceeding, holding that Section 278(e) of the Revenue Act of 1924 does not restrict or qualify Section 278(c) and holding that a waiver given after June 2, 1924, and before February 26, 1926, in a case where the statute of limitations had expired prior to June 2, 1924, was a valid waiver, is in direct conflict with the decision of the United States Circuit Court of Appeals for the Second Circuit in the case of *Uncasville Mfg. Co. v. Commissioner*, 55 Fed. (2d) 893 (*certiorari* denied April 18, 1932), and is also in conflict with the decision of this Honorable Court in the case of *Benjamin Russell v. United States*, 278 U. S. 181.

(b) This Honorable Court on October 24, 1932, granted *certiorari* in the case of *McDonnell v. United States* (Court of Claims), 59 Fed. (2d) 290, which case was relied upon by the Circuit Court of Appeals in its decision in this proceeding, and was also expressly in conflict with the Uncasville Mfg. Co. (*supra*) decision in the same respect as stated in the paragraph hereof immediately preceding.

(c) The decision of the Circuit Court of Appeals in this proceeding holding that under Section 278 of the Revenue Acts of 1924 and 1926, waivers given after the statutory period of limitations had expired, were valid, is in direct conflict with the decision of the District Court of Appeal in the case of *Joy Floral Co. v. Commissioner*, 29 Fed. (2d)) 865.

2. In the case of *Stange v. United States*, 282 U. S. 270, and *Aiken v. Burnet*, 282 U. S. 277, this Honorable

Court decided that it was not necessary that the Commissioner *personally* sign all waivers before those waivers became valid and effective. In the Aiken case the Court stated, "The requirement in Section 250(d) of that Act" (Revenue Act of 1921—same *requirement* in Section 278(c) Revenue Act of 1924) "that the Commissioner sign the consent was inserted to meet exigencies of administration, * * *." The Circuit Court of Appeals (apparently following its decision in the case of *Commissioner v. Hind*, 52 Fed. (2d) 1075), construes this Court's decision in the Stange and Aiken cases as meaning that waivers are valid even *without* the Commissioner's signature, and therefore held in the instant proceeding that the assessment waiver filed by the Pacific Coast Steel Co., on December 7, 1925, was valid even though not signed by the Commissioner or by any one else for him.

In the case of *Corn Products Refining Company v. Commissioner*, 22 B. T. A. 605 (not appealed), the Board of Tax Appeals in a well reasoned opinion construes this Court's decision in the Stange and Aiken cases as meaning that although the statute *requires the Commissioner's signature* on the consent or waiver, the statute did not require that the Commissioner *personally* sign the waivers. The Board held that the requirement of the statute must be complied with, and that unless the Commissioner's signature, made either by himself or by someone for him, appears on the consent or waiver, the waiver is invalid.

This is a very important question and undoubtedly affects the validity of a great many waivers. Since there is involved a conflict in interpreting decisions of this Court, considerable confusion and litigation would be pre-

vented by a definite expression by this Court as to this question which is involved as an issue in this proceeding.

3. In the case of *Stange v. United States*, 282 U. S. 270, this Court decided that under the provisions of Section 250(d) of the Revenue Act of 1921 which provided for the waiver by consent in writing by both the Commissioner and the taxpayer, of the statutory period of limitation for "determination, assessment and collection of the tax," an assessment waiver purporting only to extend the time for assessment of income taxes, is operative to extend the time for collection.

In this proceeding the Circuit Court of Appeals apparently followed the Stange decision since it held that the assessment waivers filed by the Pacific Coast Steel Company were valid collection waivers.

Section 278(c) of the Revenue Act of 1924 and Section 278(c) of the Revenue Act of 1926 differ from Section 250(d) of the Revenue Act of 1921 in that they authorize waivers of the statutory time *for assessment only*. The reason appears to be—Section 278(c) of both Acts (1924 and 1926) indicate the intent of the legislature that tax levies for prior years should not be affected by those Revenue Acts, and Section 278(d) provides for the collection of taxes within six years after assessment of taxes assessed after June 2, 1924, the date of enactment of the Revenue Act of 1924.

Since, therefore, the application by the Circuit Court of Appeals of the Stange decision to the instant proceeding

to hold that an assessment waiver is a valid collection waiver, appears to be in conflict with the legislative intent as to the purpose of Section 278 of the Revenue Acts of 1924 and 1926, and decides an important question of federal law, we respectfully submit that this question (whether under the Revenue Acts of 1924 and 1926 a waiver of time for assessment only is a valid waiver of time for collection as well as assessment) which is an issue in this proceeding, should be settled by this Court.

4. The Circuit Court of Appeals held that the assessment waiver filed by the Pacific Coast Steel Company, dated November 29, 1926, was valid and effective to extend the time for collection of the otherwise barred tax assessment, to February 9, 1929, six years after assessment of the tax, even though the waiver specifically provided that it "shall remain in effect until December 31, 1927, and shall then expire." We respectfully submit that the decision of the Circuit Court of Appeals holding that the terms of the waiver should be disregarded and the effective period of the waiver extended to February 9, 1929, is probably untenable (*Rahilly v. O'Loughlin*, 1 Fed. (2d) 1; *Tridell v. Munhall*, 124 Fed. 802), and that this decision holding that the six-year period for collection after assessment, provision of the Revenue Acts (Sec. 278(d) Revenue Act of 1924 and 1926) became an inextricable part of the waiver regardless of the provisions of the waiver, decides a very important question of federal law which has not been but should be settled by this Court.

We also respectfully submit that the Court's decision regarding this question is in conflict with the decision of the Court of Claims in the case of *Roy & Titcomb, Inc. v. United States*, 39 Fed. (2d) 753.

WHEREFORE, it is respectfully submitted that this petition should be granted.

Dated at Los Angeles, California, this 15 day of November, 1932.

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John P. McLaughlin, United States Collector for the First Collection District of California,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

OPINION BELOW.

No written opinion was rendered by the United States District Court for the Northern District of California, Southern Division in which Court this suit was initiated. The opinion of the United States Circuit Court of Appeals for the Ninth Circuit [R. 65], affirming the judgment of the District Court [R. 86], is reported in 61 Fed. (2d) 73.

JURISDICTION.

The judgment sought to be reviewed was entered August 22, 1932. [R. 87.] The jurisdiction of this Honorable Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

Under this heading we respectfully submit in question form, a restatement of the specification of errors hereinbefore set forth in the Petition for Certiorari.

I-1. Where an assessment of a 1917 tax, based on a return filed March 30, 1918, was made on February 9, 1923, prior to the enactment of the Revenue Act of 1924 (June 2, 1924), and where the collection of the tax so assessed was barred before the enactment of the Revenue Act of 1924 by reason of the expiration of the statutory period of limitations on collections and where a waiver purporting to extend the period of limitations *on assessment alone* to December 31, 1926, was given on December 7, 1925, and was not signed by the Commissioner, or any one for him,—

(a) Is that waiver valid even though not signed by the Commissioner or any one for him? (Sec. 278(c), Revenue Act of 1924);

(b) Is that assessment waiver a good collection waiver? (Section 278(c), Revenue Act of 1924);

(c) Is that waiver valid and effective to extend the period of limitations for the collection of the tax assessed? (Sections 277, 278(c), (d) and (e), Revenue Act of 1924, Revenue Act of 1926.) (This question affects the entire case.)

2. If question 1(c) is answered in the negative, is the liability for the assessed tax extinguished by Section 1106 of the Revenue Act of 1926? If so, is the *liability* for said tax and the right to collect, revived by the *assessment* waiver of November 29, 1926, which purported to extend the period of limitations *on assessment only* to December 31, 1927? (This question affects the validity of the collection made on June 30, 1927.)

3. If question 1 is answered in the negative, and if Section 1106 of the Revenue Act extinguished the liability for said tax, is that liability revived by Section 612 of the Revenue Act of 1928 which repealed Section 1106 of the Revenue Act of 1926 as of February 26, 1926? (This question affects the entire case.)

4. If question 3 is answered in the affirmative, is the assessment waiver of November 29, 1926 effective to extend the period for collection? (Section 278(d) and (e), Revenue Act of 1926.) (This question affects the validity of the collection on June 30, 1927.)

II-5. If both the December 7, 1925 and the November 29, 1926 waivers are valid and effective to extend the statutory period of limitations for collection of the 1917 deficiency tax, is the period of extension the period prescribed in the waiver, or the six-year period after assessment? (Section 278(d), Revenue Act of 1926.) (This question affects the validity of the collection made on August 27, 1928.)

The United States Circuit Court of Appeals decided question I-1 in the affirmative [R. 78] and as to question II-5 decided that the waiver of November 29, 1926 was effective to extend the period for collection six years from the date of assessment. [R. 80.]

STATUTES INVOLVED.

See Appendix D hereto.

STATEMENT.

A full statement of the case has been given under the heading "Statement" in the Petition for Certiorari, and in the interest of brevity is not repeated here.

ARGUMENT.

The Collection of the February 9, 1923, Assessment Was Barred by the Statute of Limitations on April 1, 1924.

This proposition was not questioned by the Circuit Court of Appeals.

The petitioner's 1917 return was filed on March 30, 1918. Under Section 250 (d) of the Revenue Act of 1921 the statute of limitations for determination, assessment and collection of the 1917 taxes was five years from the time the return was filed. Also under the same section, that period could be extended by an agreement in writing between the Commissioner and the taxpayer. The petitioner on December 18, 1922, filed an unlimited waiver which extended the time for determination, assessment and collection of the 1917 taxes (which would have expired March 30, 1923—five years after the return was filed) until April 1, 1924 (Commissioner's Mimeo. 3085 I. R. Cum. Bull. II-1, p. 174; *Stange v. United States*, 51 Sup. Ct. 145, 282 U. S. 270).

On February 9, 1923, within the statutory period of limitations the Commissioner assessed an additional 1917 tax against the petitioner in the amount of $257,443.30.

During the same month the Commissioner collected $3,833.41 [R. 22] of this tax by applying certain overpayments as a credit. No other amount was collected until 1927 and 1928.

Under Section 250 (d) of the Revenue Act of 1921, the collection of the balance of this assessment was barred after April 1, 1924. The right to collect such tax was not revived by the Revenue Act of 1924 (*Bowers v. New York and Albany Lighterage Company*, 273 U. S. 346; *Benjamin Russell v. United States*, 278 U. S. 181; *Daube v. United States*, 59 Fed. (2d) 842; *Wickwire v. Commissioner*, 10 B. T. A. 102; *Chicago Insulated Wire and Manufacturing Company v. Commissioner*, 10 B. T. A. 1195).

The Assessment Waiver of December 7, 1925, Did Not and Could Not Affect Assessments Made Prior to June 2, 1924, Nor Could It Revive the Right to Collect Where Such Right Had Expired by Operation of the Statute of Limitations Prior to June 2, 1924. (Sec. 278(e), Revenue Act of 1924.)

Conflict in Decisions—THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT IN THE CASE OF UNCASVILLE MFG. CO. *v.* COMMISSIONER, 55 FED. (2D) 893 (CERTIORARI DENIED APRIL 18, 1932), CONSTRUED SECTION 278 (E) OF THE REVENUE ACT OF 1924 AS RESTRICTING SECTION 278 (C) OF THE SAME ACT AND CONFINING SAID SECTION 278 (C) TO INSTANCES WHERE ASSESSMENT (AND COLLECTION IF COLLECTION WAIVERS ARE AUTHORIZED BY SECTION 278 (C)) WAS NOT BARRED BY THE STATUTE OF LIMITATIONS ON JUNE 2, 1924. THE COURT OF CLAIMS IN THE CASE OF MCDONNELL V. U. S., 59 FED.

(2D) 290 (CERTIORARI GRANTED OCT. 24, 1932) EXPRESSLY DISAGREED WITH THE UNCASVILLE CASE AND HELD DIRECTLY TO THE CONTRARY, THAT IS, THAT SECTION 278 (E) DID NOT QUALIFY OR RESTRICT SECTION 278 (C) OR CONFINE IT TO INSTANCES WHERE THE STATUTE HAD NOT BARRED ASSESSMENT OR COLLECTION ON JUNE 2, 1924. IN THIS PROCEEDING, THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT CITED WITH APPROVAL THE MCDONNELL CASE [R. 78] AND HELD WITH THE MCDONNELL CASE AND IN DIRECT CONFLICT WITH THE UNCASVILLE CASE BY DECIDING THAT THE DECEMBER 7, 1925, ASSESSMENT WAIVER GIVEN BY THE PACIFIC COAST STEEL CO. WAS EFFECTIVE AND REVIVED THE RIGHT OF THE GOVERNMENT TO COLLECT THE TAXES ASSESSED ON FEBRUARY 9, 1923, ALTHOUGH AT THE TIME THIS WAIVER WAS GIVEN AND PRIOR TO THE DATE THE REVENUE ACT OF 1924 BECAME EFFECTIVE, THE STATUTE OF LIMITATION HAD RUN AGAINST THE REMEDY OF COLLECTION. THIS DECISION APPEARS ALSO TO BE IN CONFLICT WITH THIS COURT'S DECISION IN THE CASE OF BENJ. RUSSELL V. U. S., 278 U. S. 181.

On June 2, 1924, the date of enactment of the Revenue Act of 1924, the collection of the 1917 deficiency tax was barred by operation of the statute of limitations. The right to collect this tax was not revived by the Revenue Act of 1924 unless the waiver filed by the petitioner under date of December 7, 1925, effected such revival. Section 277 (a) (3) of the Revenue Act of 1924 re-enacted the provisions of Section 250 (d) of the Revenue Act of 1921 insofar as it provided that the assessment and collection of any 1917 taxes should be made within five years after

the return was filed. Certain exceptions were specified, however, and these exceptions are set forth in Sections 278 (c), (d) and (e) of the Revenue Act of 1924. Section 278 (c) provides that:

> "Where both the Commissioner and the taxpayer have consented in writing to *the assessment of the tax* after the time prescribed in section 277 for *its assessment*, the tax *may be assessed* at any time prior to the expiration of the period agreed upon." (Italics ours.)

Section 278 (d) provides:

> "Where the assessment of the tax is made within the period prescribed in Section 277 or in this section, such tax may be collected * * * within six years after the assessment of the tax."

Section 278 (e) definitely limits the application of Section 278. It provides as follows:

> "This section *shall not* (1) *authorize* the assessment of a tax or the collection thereof by distraint or by a proceeding in court *if at the time of the enactment of this act* such assessment, distraint, or *proceeding was barred* by the period of limitations then in existence, *or* (2) *affect any assessment made*, or distraint or proceeding in court begun, *before the enactment of this act*."

If Section 278 (e) restricts or qualifies Section 278 (c), the waiver filed by the petitioner under date of December 7, 1925, would be invalid since if effective it would violate the specific provisions of Section 278 (e) in that it would authorize a collection of a tax barred by the period of limitations before the enactment of the 1924 Act and

would also affect the assessment made in February, 1923, before the enactment of the 1924 Act.

In the case of *Benjamin Russell v. United States, supra*, the 1918 tax was assessed on March 30, 1924. The Government contended that under Section 278 (d) of the Revenue Act of 1924 it had six years from assessment or until March, 1930, for collection. The Court in concluding that the six-year period for collection did not apply to assessments made before June 2, 1924, made the following statement:

> "Manifestly, but for Section 278 petitioners would be free from liability under the five-year limitation in the Act of 1918, continued by the Act of 1921. If Section 278 refers only to assessments made after June 2, 1924, petitioners are not liable. * * * The rather obvious design, we think," (of Section 278 (e) of the Revenue Act of 1924) "was to deprive Section 278 of any possible application to cases where assessment had been made prior to June 2, 1924."

It is true that the Court had before it only the question of whether Section 278 (e) restricted Section 278 (d). However, as indicated in the quotation immediately preceding, the Court did not confine its decision to those limitations but rather decided that Section 278 (e) deprived all provisions of Section 278 of any possible application to cases where assessment had been made prior to June 2, 1924. (There are some intimations to the contrary in the case of *Burnet v. Chicago Railway Company*, 282 U. S. 295, but see *Uncasville Mfg. Co. v. Commissioner, infra.*)

In the Russell case, the Court pointed out that under the Revenue Act of 1924, a radical distinction was created between assessments made prior to June 2, 1924, and assessments made after June 2, 1924. That this was a real distinction is proven by the legislative history of Section 278 of the Revenue Act of 1924 which shows the intention of the legislature that assessments and proceedings begun prior to the enactment of the Revenue Act of 1924 should stand on their own footing and should not be affected by any provisions of the 1924 Act (*United States v. Whyel*, 28 Fed. (2d) 30; certiorari dismissed, 49 Sup. Ct.).

The United States Circuit Court of Appeals for the Second Circuit in the case of *Uncasville Manufacturing Company v. Commissioner*, 55 Fed. (2d) 893, (*certiorari* denied April 18, 1932), held that in spite of some intimations in *Burnet v. Chicago Railway Company, supra*, to the contrary Section 278(e) confines Section 278(c) to cases where the assessment was not barred on June 2, 1924. The Court of Claims in the case of *McDonnell v. United States*, 59 Fed. (2d), 290 (*certiorari* granted October 24, 1932), refused to agree with the decision of the Circuit Court of Appeals in the Uncasville case and held directly contrary by ruling that section 278(e) of the Revenue Act of 1924 did not limit the provisions of section 278 (c) of the Revenue Act of 1924. In the instant proceeding the Circuit Court of Appeals for the Ninth Circuit agreed with the Court of Claims, and by holding that Section 278(e) did not restrict Section 278(c), rendered a decision directly in conflict with the decision of the Circuit Court of Appeals in the Uncasville Manufacturing Company case. (See also *Joy Floral Co. v. Commissioner*, 29 Fed. (2d) 865.)

The December 7, 1925, Waiver Is Invalid, Since it Was Not Signed by the Commissioner of Internal Revenue or by Anyone for Him.

Conflict in Decisions—THIS COURT IN THE CASES OF STANGE V. U. S., 282 U. S. 270; AIKEN V. BURNET, 282 U. S. 279, AND BURNET V. CHICAGO RY. EQUIPMENT CO., 282 U. S. 295, HAD BEFORE IT THE QUESTION WHETHER THE REQUIREMENT OF THE REVENUE ACTS THAT WAIVERS BE SIGNED BY BOTH THE TAXPAYER AND THE COMMISSIONER OF INTERNAL REVENUE, MADE IT NECESSARY THAT THE COMMISSIONER PERSONALLY SIGN ALL WAIVERS OR WHETHER THE SIGNATURE OF THE COMMISSIONER PLACED ON THE WAIVER BY SOMEONE ELSE FOR HIM WAS SUFFICIENT COMPLIANCE WITH THE STATUTE. THIS COURT HELD THAT IT WAS NOT NECESSARY THAT THE COMMISSIONER PERSONALLY SIGN THE WAIVERS. THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT IN THE CASE OF COMMISSIONER V. HIND, 52 FED. (2D) 1075 (WHICH WAS APPARENTLY ADHERED TO WITHOUT CITATION IN THE DECISION IN THE INSTANT CASE) AND IN THIS PROCEEDING, IN CONSTRUING THE STANGE DECISION, HELD THAT THE COMMISSIONER'S SIGNATURE NEED NOT APPEAR AT ALL UPON THE WAIVERS AND THAT THE LACK OF THE COMMISSIONER'S SIGNATURE ON THE WAIVER DID NOT AFFECT THE VALIDITY OF THE WAIVER. THE BOARD OF TAX APPEALS IN THE CASE OF CORN PRODUCTS REFINING CO. V. COMMISSIONER, 22 B. T. A. 605, IN CONSTRUING THE STANGE DECISION HELD, THAT THE STATUTE REQUIRED THE COMMISSIONER'S SIGNATURE UPON THE WAIVER, AND ALTHO THE SIGNATURE MIGHT BE PLACED ON THE WAIVER BY ANYONE ELSE FOR HIM,

WHICH WOULD BE SUFFICIENT COMPLIANCE WITH THE STATUTE, THE STANGE DECISION DID NOT INTEND TO NULLIFY THE REQUIREMENT OF THE STATUTE, AND DID NOT RULE THAT THE WAIVER WOULD BE VALID WHERE IT WAS NOT SIGNED BY THE COMMISSIONER OR ANYONE ELSE FOR HIM.

Before following the effect of the invalidity of the December 7, 1925 waiver, we wish to submit argument in support of our contentions that the said waiver is invalid as a collection waiver, first, because it is not signed by the Commissioner or any one for him, and, second, because it is a waiver of the time for assessment only, and is not a waiver of the limitation for making collections.

Section 278(c) of the Revenue Act of 1924 permits an assessment to be made at any time prior to the expiration of a period *agreed upon in writing by both the Commissioner and the taxpayer.* The waiver of December 7, 1925, (Appendix B) is signed only by the taxpayer. Although in the cases of *Stange v. United States, supra,* and *Aiken v. Burnet,* 282 U. S. 279, and *Burnet v. Chicago Railway Equipment Company,* 282 U. S. 295, this Honorable Court held that the provision requiring the Commissioner's signature was inserted for purely administrative purposes, and held that the Commissioner's signature might be placed upon the waiver by someone else without affecting the validity of the waiver, this court did not hold that the signature was not required. To hold that the signature was not required would completely nullify the specific provision that a consent or waiver must be in writing by both the Commissioner and the taxpayer. We respectfully submit that the waiver

in order to be valid must bear the signature of the Commissioner of Internal Revenue, made either by himself personally or by someone for him, and where such signature is not placed upon the waiver, the waiver is invalid. (*Corn Products Refining Company v. Commissioner*, 22 B. T. A. 605; *contra, Commissioner v. George Hind*, 52 Fed. (2d) 1075; see also *United States Refractories Company v. Commissioner*, 23 B. T. A. 872, 877.)

Waiver of December 7, 1925, Is an Assessment Waiver and Does Not Extend the Period of Limitations for Collection of the Tax Assessed on February 9, 1923.*

Conflict in Decisions—THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT HOLDING AN ASSESSMENT WAIVER UNDER THE REVENUE ACTS OF 1924 AND 1926 VALID AS A COLLECTION WAIVER, APPEARS TO BE IN CONFLICT WITH THE UNDERLYING PRINCIPLE OF DECISIONS OF THIS COURT IN THE NEW YORK & ALBANY LIGHTERAGE CO. CASE (273 U. S. 346) AND THE BENJAMIN RUSSELL CASE (278 U. S. 181) AND STANGE CASE (282 U. S. 270, 277) WHICH HELD THAT THE DISTINCTIONS BETWEEN ASSESSMENT AND COLLECTION WERE NOT TO BE DISREGARDED.

We have hereinbefore made reference to the cases of *Russell v. United States* and *United States v. Whyel* which recognize the intent of the Legislature that the

* That the waiver of December 7, 1925 (Appendix B) is a strict assessment waiver cannot be doubted. Its terms specifically confine it to an extension of the time for assessment and its reference to an appeal to the Board of Tax Appeals further indicates its restriction to assessment only, since an appeal to the Board of Tax Appeals can be taken only from a final determination before assessment or from a jeopardy assessment. The jeopardy assessment provisions are not involved in the instant proceedings.

Revenue Act of 1924 should in no way affect assessments or proceedings begun prior to June 2, 1924, the date of the enactment of the 1924 Act. Section 278(c) of the Revenue Act of 1924 provided for waivers extending the statutory period of limitations on assessments only. It was not necessary that provision be made for collection waivers, since Section 278(d) provided that the period for collection for taxes assessed after June 2, 1924, shall be six years after the date of assessment. The legislative history of Section 278 of the Revenue Act of 1924 must have put the Government on notice that any taxes assessed prior to June 2, 1924, and still collectible on that date must be collected before the expiration of the statutory period of limitation provided for in the previous revenue acts. The Government must also have been put on notice that any assessments barred from collection before June 2, 1924, were to become closed issues. If assessed taxes were still collectible after June 2, 1924, the Government could have enforced their collection. If, after June 2, 1924, the taxes were still assessable the Government could have assessed those taxes within the period of limitation provided therefor and would then have had an additional six years within which to make collection. For these reasons, we respectfully submit that Section 278(c) was enacted specifically for the purposes of changing the provisions of Section 250(d) of the Revenue Act of 1921, which provided for waivers to extend the period for "determination, assessment and collection of taxes" in order to make provision for the authorization of assessment waivers only.

The giving of the December 7, 1925, waiver as an assessment waiver only might not have been a futile act,

since the Commissioner has the power within the period of limitations to make such reexaminations, redeterminations and reassessments as may be necessary to collect the entire deficiency. (*Commissioner of Internal Revenue v. Wilson*, 60 Fed. (2d) 501, 503.) An original tax might be barred from collection and yet a deficiency proposed under a waiver might be collectible by reason of the waiver. (*Northern Anthracite Coal Company v. Commissioner*, 21 B. T. A. 1116.) In the instant proceeding the Commissioner made no further assessments after February, 1923. The cases of *Stange v. United States, supra*, and *Aiken v. Burnet, supra*, held that assessment waivers might be effective as valid collection waivers, but these cases involve Section 250(d) of the Revenue Act of 1921, which authorized collection waivers and provided one and the same period of limitation for "determination, assessment and collection" of taxes. We respectfully submit that these cases do not control the construction of waivers under Section 278(c) of the Revenue Act of 1924, since that section, as hereinbefore pointed out, authorized waivers for assessment only.

Petitioner's Liability for the February 9, 1923, Assessment Was Extinguished by Section 1106 of the Revenue Act of 1926 and That Liability Could Not Be Revived by the November 29, 1926, Waiver or by Section 612 of the Revenue Act of 1928.

Since the Circuit Court of Appeals decided that the waiver of December 7, 1925, was valid, it did not consider this question, as to the effect of Section 1106 of the Revenue Act of 1926.

If the waiver of December 7, 1925, is void or ineffective because of any of the reasons hereinbefore discussed, Section 1106(a) of the Revenue Act of 1926 (enacted February 26, 1926) would extinguish the petitioner's lia-

bility for the 1917 taxes assessed in February, 1923. The latter assessment waiver of November 29, 1926, filed by the petitioner, could not revive a liability which had been extinguished previously thereto by Section 1106. (*United States v. John Barth*, 27 Fed. (2d) 782, reversed by Supreme Court on other grounds, 279 U. S. 370; *Pepsin Syrup Company v. Schwaner*, 35 Fed. (2d) 197; *George Hind v. Commissioner*, 18 B. T. A. 96; *Peerless Woolen Mills v. Commissioner*, 13 B. T. A. 1119.) Neither could that liability, having once been extinguished, be revived by the provisions of Section 612 of the Revenue Act of 1928. (*Steiner Manufacturing Company v. Commissioner*, 18 B. T. A. 740; *United States Refractories Company v. Commissioner*, 23 B. T. A. 872, 877; *White Oak Transportation Company v. Commissioner*, 24 B. T. A. 307, 317; *Wolf Company v. Commissioner*, Memo. Op. *Prentice Hall, 1932 Fed. Tax Service*, para. 1017.)

Payments Made After the Statutory Period for Collection Had Expired Constitute Overpayments Which Are Refundable.

Section 607 of the Revenue Act of 1928 provides:

> "Any tax (or any interest, penalty, additional amount or addition to such tax) assessed or paid (whether before or after the enactment of this act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer, if claim therefor is filed within the period of limitation for filing such claim."

Under the above provision the payments made by this petitioner of $111,953.71 on June 30, 1927, and $129,910.06 on August 27, 1928, which were made after the expiration of the period of limitation properly applicable thereto, are overpayments of which petitioner is entitled to refund.

Section 278 of the Revenue Act of 1926 Does Not Authorize the Collection of a Tax Barred on February 26, 1926, the Date of Enactment of the Revenue Act of 1926.

The Circuit Court of Appeals held against the petitioner on this question.

Under Section 278 (e) of the Revenue Act of 1924, if the assessment was made prior to June 2, 1924, nothing in the Revenue Act of 1924 could affect the status of that assessment or lengthen the statutory period for its collection.

The Revenue Act of 1926 changed this situation by omitting the provisions of Section 278 (e) (2) of the Revenue Act of 1924, by inserting in Section 278(d) the provision that it should apply to assessments made before as well as after the enactment of the Revenue Act of 1926, by recognizing in Section 278(d) that the taxpayer and the Commissioner may waive the period of limitation for *collection* by adding the provision that the Commissioner may institute proceedings to collect a tax if begun "(2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer," and by providing that the prohibition in Section 278(e) regarding the application of Section 278 to assessments or collections barred at the time of enactment of the 1926 Act, should not apply where, before the enactment of the 1926 Act, the Commissioner and the taxpayer agreed in writing to the assessment or collection of the tax.

Even under the Revenue Act of 1926, Section 278(e) restricts Section 278 and prohibits the extension of the

statute of limitations (by adding six years after assessment for collection) in all cases where the statutory period for collection had expired prior to the enactment of the Revenue Act of 1926. (General Counsel Memorandum 1546, I. R. Cum. Bul. VI-1, p. 109; *E. J. Lorie v. Commissioner,* 21 B. T. A. 612; *White v. Hopkins,* 51 Fed. (2d) 159.)

Regarding the effect of Section 278(e) of the Revenue Act of 1926 the Board of Tax Appeals in the case of *Jacobs Bros. v. Commissioner,* 19 B. T. A. 315, stated:

> "Except for the collection waiver filed as aforesaid, it seems that there could be no question but that the collection was barred. The real question here is the effect of the collection waiver which was filed on December 3, 1927.
>
> "At the time of the enactment of the Revenue Act of 1926 the collection of the tax was already barred by the statutory period of limitation properly applicable thereto and the Commissioner and the taxpayer did not agree in writing prior to the enactment of the Revenue Act of 1926 to any extension of time for the collection of the tax after the expiration of the statutory period. Subdivision (e) of section 278 is a limitation upon all the other provisions of section 278 of the Revenue Act of 1926, and under that subdivision any consent or agreement by the Commissioner and the taxpayer with respect to the assessment or collection of the tax must be made prior to the enactment of that Act in order to have effect, provided at the time of the enactment of the Act the assessment or collection was barred."

The Assessment Waiver of December 7, 1925, Is Not an Agreement in Writing Between the Taxpayer and the Commissioner Within the Meaning of Section 278(e)(1) of the Revenue Act of 1926 or Section 506 of the Revenue Act of 1928.

Conflict in Decisions—THIS DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT HOLDING THAT THE WAIVER OF DECEMBER 7, 1925, WAS VALID EVEN THOUGH GIVEN AFTER THE STATUTORY PERIOD OF LIMITATION HAD EXPIRED, APPEARS TO BE IN CONFLICT WITH THE DECISION OF THE DISTRICT COURT OF APPEALS IN THE JOY FLORAL COMPANY CASE, 29 FED. (2D) 865, WHICH HELD THAT SECTION 278 OF THE REVENUE ACT OF 1926 DID NOT RECOGNIZE AS VALID ANY WAIVERS GIVEN AFTER THE STATUTORY PERIOD OF LIMITATIONS HAD EXPIRED.

In discussing the applicability of Section 278 of the Revenue Act of 1926, we had for the time being ignored the existence of the waiver executed by the taxpayer on December 7, 1925. As we have hereinbefore pointed out, Section 278(e)(1) prevented the authorization by Section 278 of the collection of any tax if, at the time of the enactment of the Act, such collection was barred by the statutory period of limitation properly applicable thereto, *unless prior to the enactment of this Act the Commissioner and the taxpayer agreed in writing thereto.*

The question now arises whether the waiver of December 7, 1925, comes within the "unless" provision of Section 278(e)(1) so as to prevent the application of the restrictive provision of Section 278(e). We have hereinbefore pointed out that Section 278(e) of the Revenue

Act of 1924 prohibited Section 278 of that Act from affecting any tax assessed prior to June 2, 1924, or from authorizing the collection of any tax, the collection of which was barred prior to June 2, 1924. By reason of that prohibition, the waiver of December 7, 1925, executed after the enactment of the Revenue Act of 1924 and after the statutory period for collection of the assessment had expired, not only could not authorize the collection of that assessment but was prohibited from being effective for that purpose. By virtue of that prohibition the waiver was void as a consent to a collection of a tax assessed and barred before June 2, 1924. Its legality could not be established at a later date by the enactment of the Revenue Act of 1926. It could not, therefore, be construed as being a consent such as was intended by the terms of Section 278(e)(1) of the Revenue Act of 1926.

In this connection also, we respectfully submit that Section 506 of the Revenue Act of 1928 (Appendix D hereto), is declaratory of the intention of the legislature as to the meaning of Section 278 of the Revenue Act of 1926 and that therefore Section 278 of the Revenue Act of 1926 does not give effect to a waiver given after the statutory period of limitations had expired. (*Joy Floral Co. v. Commissioner*, 29 Fed. (2d) 865.)

Again, this waiver does not comply with the requirements of Section 278(e) (1) of the Revenue Act of 1926, since it is not an agreement in writing between the taxpayer and the Commissioner. The waiver is not signed by the Commissioner or by any one else for him. A printed instrument bearing the signature of but one party cannot be said to be an agreement in writing between two

parties. The waiver form (Appendix B) provides spaces for the signature of both the taxpayer and the Commissioner, yet the Commissioner has failed to sign.

Again, this waiver is not an agreement in writing between the Commissioner and the taxpayer consenting to an extension of time for the *collection* of a tax. It is difficult to understand how this waiver can be interpreted as anything other than a printed agreement between the Commissioner and the taxpayer consenting to a definite extension of time for assessment and *assessment only*.

Section 278(d) of the Revenue Act of 1926 provides that a proceeding for collection may be instituted "(2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer." Section 278(c) provides "Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in Section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon. The statute recognizes the distinction between assessment and collection and provides for waivers or consents for each. The waiver of December 7, 1925, was an assessment waiver contemplated by Section 278(c) and was not a collection waiver contemplated by Section 278(d)(2) and Section 278(e)(1).

This case must therefore be considered as though no agreement or valid waiver was filed and in that event, the bar of the statute of limitations against the collection of the February, 1923, assessment was not disturbed by the Revenue Act of 1926 and the liability for that assessment was extinguished by Section 1106 of said Act.

If the Assessment Waivers of December 7, 1925, and November 29, 1926, Are Valid and Effective to Extend the Statutory Period for Collection, the Extension Expires on the Expiration Date Specified in the Waivers.

Conflict in Decisions—THE DECISION OF THE CIRCUIT COURT OF APPEALS OF THE NINTH CIRCUIT IN THIS PROCEEDING HOLDING THAT THE EXPRESS TERMS OF THE WAIVERS AS TO THEIR EXPIRATION DATES SHOULD BE DISREGARDED IS IN CONFLICT WITH THE DECISION OF THE PENNSYLVANIA CIRCUIT COURT (W. D.), IN THE CASE OF TRIDELL V. MUNHALL, 124 FED. 802; WITH THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT IN THE CASE OF RAHILLY V. O'LOUGHLIN, 1 FED. (2D) 1; WITH THE DECISION OF THE COURT OF CLAIMS IN THE CASE OF ROY & TITCOMB, INC., V. U. S., 39 FED (2D) 753, AND WITH THE DECISION OF THE DISTRICT COURT (DEL.) IN THE CASE OF REMINGTON-RAND, INC., V. U. S., 57 FED. (2D) 1069.

The Circuit Court of Appeals decided that "the waiver voluntarily executed by the appellant taxpayer on December 7, 1925, was effective and that it operated to *revive* the right of the Government to collect the taxes that had been lawfully assessed on February 9, 1923, although at the time this waiver was given and prior to the date the Revenue Act of 1924 became effective, the statute of limitations had run against the remedy of collection."

The Circuit Court of Appeals then decided that regardless of the specific terms of the waiver that the period of extension should expire December 3, 1927, the period of limitations was extended by the waivers to six years after

assessment, or February 9, 1929. [R. 82.] If this is correct, the collection on August 27, 1928, is valid. If the extension of the limitations period did not exceed the time limit prescribed in the waivers (December 31, 1927), the August 27, 1928, collection is invalid.

We have hereinbefore shown that under authority of the case of *Russell v. United States*, Section 278(e) of the Revenue Act of 1924 prevents the application of Section 278(d) of said Act to assessments made prior to June 2, 1924, the date of the enactment of the 1924 Act; that, therefore, the Government did not have six years after assessment within which to collect an assessment made prior to June 2, 1924. We have also endeavored to show that the provisions of Section 278(e) of the Revenue Act of 1926, in general, likewise restricted the application of Section 278(d) of said Revenue Act. In pointing out the difference between Section 278(d) and Section 278(e) of the Revenue Acts of 1924 and 1926, respectively, we noted that there was added to Section 278(e) of the Revenue Act of 1926 a provision that that section (278(e)) would not restrict the application of Section 278 to an assessment made prior to the date of enactment of the Revenue Act of 1926 (February 26, 1926) where the taxpayer and the Commissioner agreed in writing to a later collection or assessment of tax, and we also pointed out that there was added to Section 278(d) a provision that a tax might be collected prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer.

In view of the simultaneous additions of these provisions to Section 278(d) and Section 278(e), we feel that

it was intended that the sections be treated as related and be so applied as to be operative to bring about a fulfillment of a specific agreement between the Commissioner and the taxpayer. We feel that Section 278(e) of the Revenue Act of 1926 prohibits the application of the six-year period after assessment for collection provided for in Section 278(d); that where the taxpayer and the Commissioner argeed upon a certain period for collection of an otherwise barred tax, which circumstance qualifies the provisions of Section 278(e), then subdivision (d)(2) applies to permit the Commissioner to collect the tax within the period agreed upon. Of course, Section 278(d)(2) might also be given general application to permit the Commissioner and the taxpayer to agree upon the collection of the tax after six years after assessment. There is nothing inconsistent in this double purpose.

Even disregarding the legislative intent as to the application of these sections of the Revenue Act, we respectfully submit that the decision of the Circuit Court of Appeals in this proceeding is contrary to general law. The Circuit Court admits that by reason of the waiver the right to collect, which had theretofore been barred by the Statute of Limitations, was revived.

It is a principle of general law that where a debt is revived by a conditional new promise, it is revived subject to the conditions specified. *Rahilly v. O'Loughlin*, 1 Fed. (2d) 1. It is also a principle of general law that the debtor, in waiving the statute, is entitled to make his own terms and that by these terms alone is he to be bound. *Tridell v. Munhall*, 124 Fed. 802.

If the Commissioner of Internal Revenue was not satisfied with the conditions specified in the waiver, he had the

right to refuse to accept the waiver or to consent to those conditions. In this connection we wish to again call the Court's attention to the fact that the waiver of December 7, 1925 was not signed by the Commissioner of Internal Revenue. The Commissioner signed the waiver of November 29, 1926, and thereby agreed to that waiver and to all of its terms, which agreement he was authorized to enter into under the provisions of Section 278(d) (e) of the Revenue Act of 1926. Certainly nothing could be more definitely expressed than the provisions in the waivers that they shall be effective until a certain date and shall then expire.

When this petitioner, the Pacific Coast Steel Company, agreed with the Commissioner to revive in the Government the right to collect a tax which was barred by the Statute of Limitations, petitioner had the right to specify the terms of such agreement, and when the petitioner specified that the waiver should expire on a definite date, to which specification the Commissioner of Internal Revenue agreed by placing his signature upon the waiver, we respectfully submit that no existing statute could alter the terms of that agreement, or change the expiration date agreed upon, particularly since the agreement was not in violation of public policy. If the waiver had not mentioned an expiration date then the existing statute would have become a part of the waiver and would have supplied that deficiency. The waiver then could have been construed to have extended the time to six years after the

date of assessment. But in this case the parties being charged with a knowledge of the law specifically agreed that the expiration date should be a certain date, that is, December 31, 1927, and thereby limited the existing law in its application to that particular agreement.

In the case of *Roy & Titcomb v. United States* (Court of Claims), 39 Fed. (2d) 753, the Court in referring to the effect of a waiver on the collectibility of an assessment, made on March 13, 1924, stated:

> "Under the provisions of the consent of November 20, 1925 the Commissioner had until March 1, 1927, which was sixty days after December 31, 1926," (the waiver by its terms was effective until December 31, 1926 and sixty days thereafter if no appeal was filed to the Board of Tax Appeals) "within which to collect the amount of the additional assessment for 1918 finally determined to be due."

The additional assessment was made on March 13, 1924, and if the six-year period for collection under the 1926 Act applied, the Commissioner would have had until March, 1930, for collection. The Court must necessarily have concluded that the period for collection was limited to the period prescribed in the waiver. (See, also, *Remington-Rand, Inc. v. United States* (D. C. Delaware), 57 Fed. (2d) 1069, where the Court held that waiver extending time for collection of a March, 1924, assessment to December 31, 1925, did not expire on midnight of December 30th, but included the 31st day. Had the Court applied the six-year provision, the collection period would not have expired until March, 1930.)

CONCLUSION.

It is respectfully submitted that this case involves questions of general public interest; it raises practically every question concerning the validity and effect of waivers which are now in such a state of uncertainty due to conflicting court decisions herein referred to, and to the ambiguous expression of legislative intent as indicated chiefly by the enactment of Section 506 of the Revenue Act of 1928; and particularly is it important to the taxpayers in general to know whether their waivers or agreements with the Commissioner of Internal Revenue, which each year they are being requested to enter into, are to be construed according to their specific terms; the matters involved are important questions of federal and general law which should be settled by this Honorable Court. For these reasons, herein presented to this Court, we respectfully request the issuance of the writ of certiorari in this case.

Respectfully,

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Appendix A.

December 16, 1922.

INCOME AND PROFITS TAX WAIVER.

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, PACIFIC COAST STEEL COMPANY, of San Francisco, California, and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of the said Corporation, for the years 1911 to 1917, inclusive, under the Revenue Act of 1921, or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, irrespective of any period of limitations.

PACIFIC COAST STEEL COMPANY,

[Seal] Taxpayer.

By E. M. WILSON, (Sgd.)
President.

.....

Commissioner.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

Appendix B.

(74M)
TREASURY DEPARTMENT
Internal Revenue Service
Form 872A

INCOME AND PROFITS TAX WAIVER FOR TAXABLE YEARS ENDED PRIOR TO JANUARY 1, 1922.

IT:E:SM
OBB-22907
A-22908
B-22909

Dec. 7, 1925.

In pursuance of the provisions of existing Internal Revenue Laws PACIFIC COAST STEEL CO., a taxpayer of Rialto Bldg., San Francisco, California, and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year (or years) 1917, 1918, 1919 and 1920 under existing revenue acts, or under prior revenue acts.

This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1926, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

PACIFIC COAST STEEL COMPANY,
Taxpayer,

[Seal]

By E. M. WILSON, (Sgd.)
President.

.....
Commissioner.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

Appendix C.

INCOME AND PROFITS TAX WAIVER FOR TAXABLE YEARS ENDED PRIOR TO JANUARY 1, 1922.

CC:I:II:Cl

November 29, 1926.

In pursuance of the provisions of existing Internal Revenue Laws PACIFIC COAST STEEL COMPANY, a taxpayer of San Francisco, California, and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year (or years) 1917 under existing revenue acts, or under prior revenue acts.

This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1927, and shall then expire.

PACIFIC COAST STEEL COMPANY,
Taxpayer,

[Seal]

By E. M. WILSON, (Sgd.)
President.

D. H. BLAIR,
CAD.,
Commissioner.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

Appendix D.

STATUTES INVOLVED.

REVENUE ACT OF 1918 (FEBRUARY 24, 1919), Chap. 18, 40 Stat. at L.

Section 250 (d). Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made * * *.

REVENUE ACT OF 1921 (NOVEMBER 23, 1921), Chap. 136, title II—Income Tax, 42 Stat. at L.

Section 250 (d). The amount of income, excess-profits, or war-profits taxes due under any return made under this act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this act for prior taxable years, or under prior income, excess profits, or war profits tax acts, * * * shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination of assessment and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this act or under prior income, excess profits, or war profits tax acts, * * * shall be begun, after the expiration of five years after the date when such return was filed, but

this shall not affect suits or proceedings begun at the time of the passage of this act * * *.

REVENUE ACT OF 1924 (JUNE 2, 1924), Chap. 234, title II (effective January 1, 1924), 43 Stat. at L. U. S. C. title 26:

Sec. 277 (a). Except as provided in section 278 and in subdivision (b) of section 274 and in subdivision (b) of section 279, (274 and 279 are not here important).

(1) The amount of income, excess-profits and war-profits taxes imposed by the Revenue Act of 1921, and by such act as amended, for the taxable year 1921 and succeeding taxable years, and the amount of income taxes imposed by this act, shall be assessed within four years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period.

(2) The amount of income, excess-profits, and war-profits taxes imposed by * * * the Revenue Act of 1917, the Revenue Act of 1918, and by any such act as amended, shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period.

Section 278 (c), (d) and (e) hereinafter set out in comparison with same sections of Revenue Act of 1926.

Section 280. If after the enactment of this act the commissioner determines that any assessment should be made in respect of any income, war profits, or excess profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or by any such act as amended, the amount which should be assessed (whether as deficiency

or as interest, penalty, or other addition to the tax) shall be computed as if this act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand) as in the case of the taxes imposed by this title, except as otherwise provided in section 277.

Section 1100 (a). The following parts of the Revenue Act of 1921 are repealed, to take effect (except as otherwise provided in this act) upon the enactment of this act, subject to the limitations provided in subdivisions (b) and (c).

Title II (called "Income Tax") as of January 1, 1924;

* * *

(b) The parts of the Revenue Act of 1921 which are repealed by this act shall (except as provided in sections 280 and 316 and except as otherwise specifically provided in this act) remain in force for the assessment and collection of all taxes imposed by such act, and for the assessment, imposition, and collection of all interest, penalties, or forfeitures which have accrued or may accrue in relation to any such taxes, and for the assessment and collection, to the extent provided in the Revenue Act of 1921, of all taxes imposed by prior income, war-profits, or excess-profits tax acts, and for the assessment, imposition, and collection of all interest, penalties, or forfeitures which have accrued or may accrue in relation to any such taxes * * *.

REVENUE ACT OF 1926 (FEBRUARY 26, 1926), Chap. 27, 44 Stat. at L.

Section 277 (a). Except as provided in section 278—

(1) The amount of income taxes imposed by this Act shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

(2) The amount of income, excess-profits, and war-profits taxes imposed by the Revenue Act of 1921, and by such act as amended, for the taxable year 1921 and succeeding taxable years, and the amount of income taxes imposed by the Revenue Act of 1924, shall be assessed within four years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

(3) The amount of income, excess-profits and war-profits taxes imposed by the act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes", approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes", approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

Section 278 (c), (d) and (e) hereinafter set out in comparison with same sections of Revenue Act of 1924.

Section 283 (a). If after the enactment of this Act the Commissioner determines that any assessment should

be made in respect of any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or by any such Act as amended, the Commissioner is authorized to send by registered mail to the person liable for such tax notice of the amount proposed to be assessed, which notice shall, for the purposes of this Act, be considered a notice under subdivision (a) of section 274 of this Act. In the case of any such determination the amount which should be assessed (whether as deficiency or as interest, penalty, or other addition to the tax), shall, except as provided in subdivision (d) of this section, be computed as if this Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand and the provisions prohibiting claims and suits for refund) as in the case of a deficiency in the tax imposed by this title, except as otherwise provided in section 277 of this Act.

Section 1106 (a). The bar of the statute of limitations against the United States in respect of any internal revenue tax shall not only operate to bar the remedy but shall extinguish the liability; * * *

Section 1200 (a). The following parts of the Revenue Act of 1924 are repealed, to take effect (except as otherwise provided in this Act) upon the enactment of this Act, subject to the limitations provided in subdivision (b);

Title II (called "Income Tax") as of January 1, 1925, except section 257 and sections 271 to 282, inclusive:

Section 257 and sections 271 to 282, inclusive (being certain administrative provisions of the income tax); * * *

(b) The parts of the Revenue Act of 1924 which are repealed by this Act shall (except as provided in sections 283 and 318 and except as otherwise specifically provided in this Act) remain in force for the assessment and collection of all taxes imposed by such Act, and for the assessment, imposition, and collection of all interest, penalties, or forfeitures which have accrued or may accrue in relation to any such taxes, and for the assessment and collection, to the extent provided in the Revenue Act of 1924, of all taxes imposed by prior income, war-profits, or excess-profits tax acts, and for the assessment, imposition, and collection of all interest, penalties, or forfeitures which have accrued or may accrue in relation to any such taxes. In the case of any tax imposed by any part of the Revenue Act of 1924 repealed by this Act, if there is a tax imposed by this Act in lieu thereof, the provision imposing such tax shall remain in force until the corresponding tax under this Act takes effect under the provisions of this Act.

Act of 1926	Act of 1924
Sec. 278 (c). Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon.	Sec. 278 (c). Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in Section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon.
(d) Where the assessment of any income, excess-profits, or war-profits tax imposed by this title or by	(d) Where the assessment of the tax is made within the period prescribed in section 277 of this sec-

prior Act of Congress has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer.

(e) This section shall not bar a distraint or proceeding in court begun before the enactment of the Revenue Act of 1924; nor shall it authorize the assessment of a tax or the collection thereof by distraint or by proceeding in court (1) if at the time of the enactment of this Act such assessment, distraint or proceeding was barred by the statutory period of limitation properly applicable thereto, unless prior to the enactment of this Act the Commissioner and the taxpayer agreed in writing thereto, or (2) contrary to the provisions of subdivision (a) of section 274 of this Act.

tion, such tax may be collected by distraint or by a proceeding in court, begun within six years after assessment of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period within which an assessment may be made.

(e) This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2) affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act.

REVENUE ACT OF 1928 (MAY 29, 1928), Chap. 852, 45 Stat. at L.

Section 506. Waivers after Expiration of Period of Limitation.

(a) Section 278 (c) and (d) of the Revenue Act of 1926 are amended to read as follows:

"(c) Where before the expiration of the time prescribed in section 277 for the assessment of the tax, both the Commissioner and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

(d) Where the assessment of any income, excess-profits, or war-profits taxes imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer before the expiration of such six-year period. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon."

(b) Section 278 of the Revenue Act of 1926 is further amended by adding at the end thereof a new subdivision to read as follows:

"(f) Any agreement which would be within the provisions of subdivision (c) or (d) of this section but for the fact that it was executed after the expiration of the period of limitation extended by such agreement, shall be valid and effective, according to its terms if entered into after the enactment of the Revenue Act of 1928 and before January 1, 1929."

(c) The amendments made by this section to the Revenue Act of 1926 shall not be construed as in any manner affecting the validity of waivers made prior to the enactment of this Act, which shall be determined according to the law in existence at the time such waiver was filed.

Section 607. Effect of Expiration of Period of Limitation Against United States.

Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim.

Section 612. Repeal of Section 1106 (a) of 1926 Act.

Section 1106 (a) of the Revenue Act of 1926 is repealed as of February 26, 1926.